

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 675 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE D.G.KARIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

PESUMAL CHANCHALDAS SEVKANI

Versus

STATE OF GUJARAT

Appearance:

None appears for Petitioners

MR. S.R.DIVETIYA APP for Respondent No. 1

CORAM : MR.JUSTICE D.G.KARIA

Date of decision: 13/03/96

ORAL JUDGEMENT

By this petition under Article 227 of the constitution of India, the petitioners challenged the validity and legality of the order dt. June 21, 1986 passed by the learned Metropolitan Magistrate, 9th Court, Ahmedabad, below application dt. January 15, 1985, submitted by the petitioners in Crime Register No. 261/84 and confirmed by the learned Additional City Sessions Judge at Ahmedabad vide his order dt. May 11, 1987 in Criminal Revision Application No. 251 of 1987.

2. Both the aforesaid impugned orders came to be passed in following circumstances:-

The petitioners came to be arrested by Naranpura Police on July 12, 1984 in connection with Crime Register No. 261/84 for the offences under the Bombay Prohibition Act. The petitioners were produced before the learned Metropolitan Magistrate, Court No.9 at Ahmedabad on July 13, 1984 and were released on bail on the same day. According to the petitioners, the investigation was not completed within six months from the date of arrest of the accused persons. An application purporting to be under section 167 (5) of the Code of Criminal Procedure, 1973 (for short 'Code') was, therefore, submitted contending, inter alia, that the offences alleged against the petitioners were triable summons cases and investigation was not concluded within a period of six months from the date on which the accused petitioners were arrested and further that the Investigating Officer has not made any attempt to satisfy the learned Magistrate about the circumstances, if any, within which the investigation was not concluded within the period of six months. In fact, according to the petitioners, no further time was sought by the Investigating Agency to continue the investigation. The petitioners, therefore, prayed that the learned Magistrate should make necessary order stopping further investigation into offences and that the petitioners be ordered to be discharged.

3. The learned Magistrate, by the impugned order dt. June 21, 1986, rejected the said application of the petitioners, holding that the offence, alleged against the petitioners under section 65(a) of the Bombay Prohibition Act, prescribes the sentence to the extent of three years and also with fine. The learned Magistrate was, thus, of the view that the offences alleged against the petitioners would be triable as warrant case. He, therefore, rejected the said application.

4. The petitioners, being aggrieved by the aforesaid order of the learned Magistrate, preferred Criminal Revision Application No. 251 of 1987 in the City Sessions Court at Ahmedabad. By the order dt. May 11, 1987, the learned Additional City Sessions Judge was pleased to reject the said application, confirming the aforesaid order passed by the learned Magistrate.

5. The aforesaid Special Criminal Application was preferred by the petitioners through his advocate Mr.B.C.Patel, now the Hon'ble Judge of this court and was

practising then. A necessary notice was sought to be served on the petitioners on elevation of Mr.B.C.Patel as the Hon'ble Judge of this court, on June 14, 1994, indicating that the petitioners may appoint another advocate in the matter or to remain personally present before this court. The petitioners nos. 2 and 3 have been duly served. The petitioner no.1 is reported to have died. Petitioner no.4 could not be served as it is reported that he is not residing at the given address. Petitioners nos. 2 and 3, though served, have not chosen to remain present, nor they have appeared through any advocate. The case being of the year 1984, it is not desirable or advisable to wait and find out the whereabouts of petitioner no.4 inasmuch as, it is reported that he is not residing in the given address and as such, it is not possible to locate him. Under the circumstances, the matter is heard and disposed of on merits and accordance with law and with the assistance of Mr. S.R.Divetiya, learned APP, appearing for the respondent State.

5. The short question that has involved in the present petition is the interpretation and application of provisions of sub section (5) of section 167 of the Code. It reads as under:-

- (5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

Section 167 of the Code provides about the procedure, when investigation cannot be completed within 24 hours, and such other eventualities of the investigation. Sub sec.(5) of section 167 of the Code empowers Magistrate to stop further investigation into the offence, if investigation is not concluded within a period of six months from the date on which accused is arrested, unless, officer making the investigation satisfies Magistrate that for special reason and in the interest of justice, continuation of the investigation beyond the period of six months is necessary. In the instant case, no such application is submitted on behalf of the Investigating Agency to make an attempt to satisfy

Magistrate that on account of some reasons, apart special reason, the investigation could not be completed, nor it is the case of the prosecution at any point of time that in the interest of justice, continuation of investigation beyond period of six months was necessary. Sub section (5) is applicable in cases which are triable as summons cases. The learned Magistrate rejected the application holding that the offences alleged against the petitioners may be warrant triable case. In this connection, a reference to Sec. 116 of the Bombay Prohibition Act will be necessary. Sec.116 provides procedure to be followed by the Magistrate in the offences under the Bombay Prohibition Act. Sec.116 of the Bombay Prohibition Act reads as under:-

Section 116: Procedure to be followed by Magistrate:-

In all trials for offence under this Act, the Magistrate shall follow the procedure prescribed in the Code of Criminal Procedure 1898 (V of 1898), for the trial of summary cases in which an appeal lies.

In view of the aforesaid express provision of procedure to be followed and tried for the offence under the Act, there is no question for trying the offence under the Bombay Prohibition Act as warrant triable case. Both the courts below have not appreciated the procedure to be followed in trial for offences under the Bombay Prohibition Act in proper perspective.

6. Sec. 167(5) of the code is mandatory in character. It is the duty of the court and Police as well to see that no investigation is continued in a summon case beyond six months from the date of the arrest of the accused without obtaining the permission of the court. Non-compliance of provisions of Sec. 167(5) is an illegality and cannot be said to be mere irregularity which can be cured under sec. 460 of the Code.

7. There is also another facet of the case. The petitioners accused were arrested way back in the year 1984. By passage of 12 years till then it would be difficult for the prosecution to secure the presence of the witnesses and to substantiate its case against the petitioners. One of the petitioners, petitioner no.1 has even expired by now. The Police and the Investigating Officer have not been able to locate accused no.4 Suresh Nair. In this peculiar facts and circumstances of the case, the petition deserves to be allowed. It appears,

while admitting this petition, no stay as to further proceeding of criminal case registered vide CR.No. 461/84 of Naranpura Police Station, was granted by this court. Thus, criminal case against the petitioners accused would have been either concluded. However, it is not known, what was the fate of the said criminal case, nor learned APP is in a position to throw light in this connection. In the above view of the matter, the petition is allowed. The impugned orders are quashed and set aside. The application of the petitioners at Ex.3 in CR. No.461/84 on the file of learned Metropolitan Magistrate, Court No.9, Ahmedabad, stands granted. Rule is accordingly made absolute.
